UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.	§	CRIM. ACTION NO. 2:23-CR-00240
	§	
DERRICK HAHN	§	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

Defendant stands indicted on a single count of felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(8). (D.E. 1). Defendant now moves to dismiss the indictment pursuant to *New York State Rifle and Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), challenging § 922(g)(1) because it violates the Second Amendment. *See* (D.E. 17). For the reasons below, the Court **DENIES** the motion. (D.E. 17).

I. The Parties' Arguments

A. Defendant's Argument

In his motion, Defendant contends "that his prosecution is now impermissible . . . because of the recognition of rights embedded within the Second Amendment as recognized by *Bruen*." *Id.* at 1. Specifically, Defendant argues that (1) the Second Amendment's plain text covers Defendant's conduct, *id.* at 3–4; and (2) the Government cannot meet its burden to show that § 922(g)(1)'s restrictions on felons' possession of firearms are consistent with the Nation's historical tradition of firearm regulation, *id.* at 4–7. In support of his argument, Defendant relies on nonbinding case law such as *Range v. Attorney General U.S.*, 69 F.4th 96 (3d Cir. 2023), *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309 (S.D. Miss. June 28, 2023) (Reeves, J.) (designated for publication), and *Kanter v. Barr*, 919 F.3d 437, 451–52 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by Bruen*, 142 S. Ct. 2111. *See* (D.E. 17, p. 3–4, 6–7).

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B. The Government's Argument

Conversely, the Government argues that *Bruen* does not upend Fifth Circuit caselaw holding that § 922(g)(1) is constitutional. (D.E. 25, p. 5–8). Further, the Government argues that "persuasive precedents following *Bruen* strongly favor[] upholding the constitutionality of § 922(g)(1)." *Id.* at 4–5. And, even if the Court independently considered § 922(g)(1)'s post-*Bruen* constitutionality, the Second Amendment's text does not "prevent Congress from banning firearm possession by felons[,] and § 922(g)(1) is consistent with the [n]ation's historical tradition of firearm regulation." *Id.* at 8–15.

II. Law

The Second Amendment provides in relevant part that "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. But "this right is not unlimited." *United States v. Mendez*, No. 2:22-CR-00656, 2023 WL 3097243, at *1 (S.D. Tex. Apr. 26, 2023) (Tipton, J.); *see also United States v. Mosley*, No. 4:23-cr-0041, 2023 WL 2777473, at *1 (N.D. Tex. Apr. 4, 2023) (Pittman, J.) (recognizing Second Amendment rights have "never been unlimited") (citing *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). "Indeed, the United States has a long history of categorically restricting the possession or ownership of firearms, spanning from its colonial era through present day." *Mosley*, 2023 WL 2777473, at *1 (citing Eric M. Ruben & Darrell A.H. Miller, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & CONTEMP. PROBS. 55 (2017)).

A. Supreme Court Precedent

The Supreme Court has examined the Second Amendment's scope and applicability in three recent cases. In *Heller*, the Court determined "that the Second Amendment confers 'an individual right to keep and bear arms[]'" and struck down a law "totally ban[ning] handgun

possession in the home." *United States v. Schnur*, No. 1:23-CR-65-LG-BWR-1, 2023 WL 4881383, at *1 (S.D. Miss. July 31, 2023) (Guirola, Jr., J.) (designated for publication) (quoting *Heller*, 554 U.S. at 595, 628). Importantly, the *Heller* Court noted that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons[.]" *Heller*, 554 U.S. at 626.

Then, two years later, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), "the Supreme Court incorporated the Second Amendment's guarantees against the States through the Fourteenth Amendment." *Schnur*, 2023 WL 4881383, at *1. At the same time, in dicta, the Supreme Court reiterated that *Heller* "did not cast doubt on such longstanding regulatory measures as prohibitions on the possession of firearms by felons and the mentally ill." *Id.* (quoting *McDonald*, 561 U.S. at 786); *see also Heller*, 554 U.S. at 626–27.

Most recently, in *Bruen*, the Supreme Court held "that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." 142 S. Ct. at 2122. The *Bruen* Court "characterized its earlier decisions as 'recogniz[ing] . . . the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense.'" *Schnur*, 2023 WL 4881383, at *1 (quoting *Bruen*, 142 S. Ct. at 2122). The Court also "clarified that the appropriate methodology to address Second Amendment claims centers 'on constitutional text and history[]'" rather than a two-step inquiry "involving 'means-end scrutiny[.]'" *Id.* (quoting *Bruen*, 142 S. Ct. at 2128–29). Specifically, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2126. "To justify its regulation, . . . the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* And while the issue of convicted felons' right to possess a firearm was not before the Supreme Court, it repeatedly noted

that the *Bruen* petitioners "—two ordinary, *law-abiding*, adult citizens—are part of 'the people' whom the Second Amendment protects." *Bruen*, 142 S. Ct. at 2134 (emphasis added) (citing *Heller*, 554 U.S. at 580).

In sum, while the Supreme Court has not squarely addressed the constitutionality of felon-in-possession statutes, it has in dicta referred to those statutes and other similar regulations as "presumptively lawful[.]" *Heller*, 554 U.S. at 626–27, 627 n.26; *see also Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (referring to the *Heller* footnote).

B. Section 922(g)(1)

Relevant to this case, 18 U.S.C. § 922(g)(1) makes it illegal for any person:

> who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> . . . .
> [t]o . . . possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

After *Bruen*, two related issues have been extensively litigated: (1) whether relevant pre-*Bruen* Fifth Circuit precedent is still binding; and (2) whether § 922(g)(1) remains constitutional. *See, e.g.*, *Mendez*, 2023 WL 3097243, at *1; *United States v. Jordan*, No. EP-22-CR-01140-DCG-1, 2023 WL 157789, at *1 (W.D. Tex. Jan. 11, 2023) (Guaderrama, J.) (designated for publication); *United States v. Collette*, 630 F. Supp. 3d 841, 842 (W.D. Tex. 2022) (Counts, J.).

III. Analysis

A. Section 922(g)(1) is constitutional under Fifth Circuit precedent.

Fifth Circuit precedent forecloses the argument that § 922(g)(1) is unconstitutional. *See, e.g.*, *United States v. Massey*, 849 F.3d 262, 266 (5th Cir. 2017) ("This court has repeatedly emphasized that the constitutionality of § 922(g)(1) is not open to question." (citation omitted)). As other district courts have recognized, before *Bruen* "[t]he Fifth Circuit has held or otherwise

stated in numerous binding, published opinions that the Second Amendment does *not* prohibit Congress from barring felons from possessing firearms." *Jordan*, 2023 WL 157789, at *2;[1] *see also Mosley*, 2023 WL 2777473, at *2 ("The Fifth Circuit has held that restrictions prohibiting convicted felons from possessing firearms do not violate the Second Amendment.") (collecting cases).

B. The Court remains bound by Fifth Circuit precedent holding that § 922(g)(1) is constitutional.

This Court is bound by Fifth Circuit precedent holding that § 922(g)(1) is constitutional. *See, e.g.*, *Texas v. U.S. Dep't of Homeland Sec.*, No. 6:23-CV-00007, 2023 WL 2457480, at *3 (S.D. Tex. Mar. 10, 2023) (Tipton, J.) (designated for publication). The Court is aware of the Fifth Circuit's post-*Bruen* decision in *United States v. Rahimi*, which held that 18 U.S.C. § 922(g)(8)—prohibiting individuals subject to a domestic violence restraining order from possessing a firearm—is no longer constitutional. 61 F.4th 443, 448 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023). However, "*Rahimi* is legally distinguishable from this case because the statutory section in *Rahimi* and this case regulate different classes of people." *Mendez*, 2023 WL 3097243, at *3. "In *Rahimi*, the Fifth Circuit reviewed the constitutionality of [§] 922(g)(8), which prohibited firearm possession by a class of people subject to a court order who *had not been* convicted of a felony." *Id.* (citing *Rahimi*, 61 F.4th at 452). "This case is different[,]" as it only "implicates [§] 922(g)(1), which regulates a class of individuals who *have been* convicted of a felony." *Id.* Thus, in the absence of further direction from the Fifth Circuit, *Rahimi* does not render § 922(g)(1) unconstitutional. *See id.* (holding that "it is constitutional to prohibit already convicted felons from

[1] "The Fifth Circuit has also reached that same holding in non-binding, unpublished decisions too numerous to list here." *Jordan*, 2023 WL 157789, at *2 n.3 (citing *United States v. Gipson*, 182 F. App'x 340, 340 (5th Cir. 2006)).

possessing firearms").

The Court is also aware that some district courts have interpreted *Rahimi* as declaring that prior Fifth Circuit precedent concerning laws implicating the Second Amendment is now obsolete. *Schnur*, 2023 WL 4881383, at *3 (first citing *Rahimi*, 61 F.4th at 450–51; then citing *United States v. Zelaya Hernandez*, No. 3:23-CR-0056, 2023 WL 4161203, at *2–3 (N.D. Tex. June 23, 2023) (Boyle, J.) (designated for publication); and then citing *United States v. Barber*, No. 4:20-CR-384, 2023 WL 1073667, at *4 (E.D. Tex. Jan. 27, 2023) (Jordan, J.)). This Court disagrees. The language at issue in *Rahimi*—that *Bruen* fundamentally changed the Fifth Circuit's analysis of laws implicating the Second Amendment, "'rendering [] prior precedent obsolete'"—appears to refer only to the obsolescence of pre-*Bruen analysis*, and not pre-*Bruen holdings*, which remain binding on this Court. *See Schnur*, 2023 WL 4881383, at *2, 3–4 (quoting *Rahimi*, 61 F.4th at 450–51).

Further, "[n]othing in *Bruen* changed [pre-*Bruen* Fifth Circuit cases], which remain binding." *Mendez*, 2023 WL 3097243, at *2. And this Court is "'not free to overturn' the Fifth Circuit's pre-*Bruen* decisions upholding [§] 922(g)(1)." *Jordan*, 2023 WL 157789, at *7 (quoting *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 789 (5th Cir. 2021)). Importantly, as the Fifth Circuit explained in *Bonvillian*, "for a Supreme Court decision to change [the Fifth] Circuit's law," the intervening Supreme Court case "must be more than merely illuminating with respect to the case before [the court]"; it "must unequivocally overrule prior precedent." 19 F.4th at 792 (internal quotations and citations omitted). Additionally, the power to declare that an intervening Supreme Court case overrules an otherwise-binding Fifth Circuit case lies with the Fifth Circuit, not the district courts. *See Jordan*, 2023 WL 157789, at *7. Thus, the Court remains bound by the Fifth Circuit's treatment of § 922(g)(1) "absent a Fifth Circuit or Supreme Court decision reaching the

issue." *Schnur*, 2023 WL 4881383, at *3; *see also United States v. Pickett*, No. 22-11006, 2023 WL 3193281, at *1 (5th Cir. May 2, 2023) (per curiam) ("[T]here is no binding precedent holding that § 922(g)(1) is unconstitutional and it is not clear that *Bruen* dictates such a conclusion[.]" (citations omitted)); *United States v. Garza*, No. 22-51021, 2023 WL 4044442, at *1 (5th Cir. June 15, 2023) (per curiam) ("[T]here is no binding precedent explicitly holding that § 922(g)(1) is unconstitutional on its face" and "it is not clear that either *Bruen* or *Rahimi* dictate such a result[.]" (citations omitted)); *Mendez*, 2023 WL 3097243, at *2.[2] As such, the Court need not analyze § 922(g)(1) afresh as the statute is not unconstitutional on its face. *See United States v. Herrera*, No. H.-20-692, 2023 WL 5917414, at *2 (S.D. Tex. Sept. 11, 2023) (Rosenthal, J.) ("Although neither *Bruen* nor *Rahimi* have addressed the effect, if any, of the Supreme Court's Second Amendment jurisprudence on [defendant's] claims . . . this court follows existing Fifth Circuit precedent. That precedent requires the court to deny the motion to dismiss.").

IV. Conclusion

For the reasons stated above, the Court **DENIES** Defendant's motion to dismiss the indictment. (D.E. 17).

SO ORDERED.

DAVID S. MORALES
UNITED STATES DISTRICT JUDGE

Signed: Corpus Christi, Texas
November 29th, 2023

[2] The Fifth Circuit has expressed skepticism that its precedent regarding § 922(g)(1) is abrogated by *Bruen*. *See United States v. Washington*, No. 22-10574, 2023 WL 5275013, at *1 (5th Cir. Aug. 16, 2023) (per curiam) (noting "*Rahimi* suggests that *Bruen*'s logic may not extend to [§ 922(g)(1)] (citations omitted)).